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a conflict the sum denoted by the words is the sum payable.³² An instrument with a printed limitation of amount but drawn for a larger sum seems irregular, but it was regarded as notice, the point of irregularity not being raised.³³ But a note which does not contain the stamp required by the federal revenue statute was held not complete and regular on its face,³⁴ and this seems to be the first true holding of this type.

The "complete and regular" section seems to be designed to provide for those miscellaneous cases where the instrument is different from the usual run. In connection with this, it is to be noted that the English Bills of Exchange Act uses the words as a general qualification and not as one of the several parallel conditions of being a holder in due course.³⁵ While it may seem unjust to criticize the tendency of the courts to make use, in many kinds of cases, of words which are present in the Act and which lend themselves so readily to such use (for it is undeniable that an instrument which lacks a complete date of payment, or a payee, or an amount, is not complete and regular on its face), it is submitted that the mere presence of words capable of a broad interpretation does not warrant their extension to cases which can be decided on more fundamental grounds under sections which specifically control such situations. The philosophy back of the sections is doubtless the feeling that a holder in due course, who is arbitrarily allowed to recover frequently at the expense of another innocent party, must be limited by strict rules and must have acted in a normal manner, above suspicion, in taking a perfectly usual type of instrument.

NON-DIRECTION BY THE TRIAL COURT AFTER REFUSAL OF REQUEST FOR ERRONEOUS INSTRUCTION.—Two recent cases illustrate the conflict of authority on the question as to whether failure to instruct on a point after a refusal by the court to give a requested erroneous instruction is reversible error on appeal. In *Louisville, etc. Ry. v. Craft* (Ky. 1921) 233 S. W. 741, the defendant's counsel had requested an erroneous instruction as to the measure of damages. The trial court had refused to give this instruction and had given no instruction on this point. The Kentucky Court of Appeals held that the failure to give a correct instruction as to the measure of damages was reversible error, on the ground that the trial court is under a duty to give a proper instruction on a point attempted to be covered by a defective request.

On the other hand, in *Parrott Tractor Co. v. Brownfel* (Ark. 1921) 233 S. W. 706, the Arkansas Court, on similar facts, reached a contrary result. This court took the view that the trial court was not bound to give any instruction unless a correct one was asked, and hence the appellant could not complain of the court's failure to instruct on the measure of damages, inasmuch as it did not ask for a correct instruction on the point.

Each of these views is supported by respectable authority, though probably the majority view favors the Arkansas holding.¹ Those courts that have adopted

³² N. I. L. § 17 (1). Cf. *Heeney v. Addy* [1910] Ir. 2 K. B. 688.

³³ *Marshall & Co. v. Kirschbaum & Sons*, *supra*, footnote 21.

³⁴ *Lutton v. Baker* (1919) 187 Iowa 753, 174 N. W. 599.

³⁵ § 29 (1).

¹ The following jurisdictions are in accord with the Arkansas rule: *Alexander v. Star-Chronicle Co.* (1917) 197 Mo. App. 601, 198 S. W. 467; *Carter & Ford v. Brown* (1908) 4 Ga. App. 238, 61 S. E. 142; *McWhorter v. Bluthenthal & Bickart* (1902) 136 Ala. 568, 33 So. 552; *Edwards v. Western Union, etc. Co.* (1908) 147 N. C. 126, 60 S. E. 900; *Rolfe v. Rich* (1893) 149 Ill. 436, 35 N. E. 352; *Williams v. City of Lansing* (1908) 152 Mich. 169, 115 N. W. 961; *Bagley v. Smith* (1853) 10 N. Y. 489; see *Anderson v. Northern Pacific Ry.* (1906) 34 Mont. 181, 201, 85 Pac. 884. This seems to have been the early rule in Kentucky. *Owings &*

the view expressed by the Kentucky court² base their decisions on the ground that the requested instruction, though erroneous, is sufficient to call the court's attention to the point involved, and the court is therefore under a duty to give a proper instruction as to the law applicable to that point. This is the long-established rule of the Texas courts. These courts attempt to draw a line of distinction between requests which are insufficient to impose upon the court the duty of charging the jury, and requests for erroneous instructions which sufficiently call the court's attention to a proposition of law, so as to impose the duty of charging the jury on that point. Thus, a mere request to charge on a point, without offering any instruction on that point, is clearly not sufficient, nor is a requested instruction which merely "suggests" the point to be submitted.³ So also, a request to instruct that the burden of proof was on the defendant in a certain case to show himself exempt from liability, was properly refused because it was erroneous; and it was held insufficient to impose a duty on the trial judge of charging that the burden was on the defendant of producing evidence to rebut a presumption in the plaintiff's favor.⁴

The Virginia courts have adopted a rule mid-way between these views. They hold that although as a general rule a "party cannot, by asking for an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case,"⁵ yet, "where an instruction offered is equivocal, so that either to give it or refuse it might mislead the jury, the duty is imposed upon the court so to modify it as to make it plain."⁶ But in a recent Virginia case, the court severely criticized the latter rule as being too "vague and uncertain," due to the difficulty of determining when a request is so equivocal as to be likely to mislead the jury whether it be given or refused.

In civil cases,⁸ by the weight of authority, the trial judge is not bound to instruct the jury in the absence of specific request for instruction from counsel. Hence mere non-direction, either total or partial, is not ground for reversal where no instructions are requested.⁹ But some jurisdictions hold that the trial judge is under a duty to instruct the jury upon all issues raised by the evidence, and that counsel's failure to request an instruction does not relieve the court of this duty.¹⁰ It is attempted by others to distinguish between total non-direction by

Co. v. Trotter & Scott (Ky. 1808) 1 Bibb 157. It is also the rule in England. *Ford v. Lacey* (1861) 30 L. J. Exch. 351; 2 Thompson, *Trials* (2d ed. 1912) § 2341.

² *Rounds v. Coleman* (Tex. Civ. App. 1919) 214 S. W. 496; *Black v. Buckingham* (1899) 174 Mass. 102, 54 N. E. 494. The same result is reached by statute in Wyoming. *Union Pac. Ry. v. Jarvi* (1890) 3 Wyo. 375, 23 Pac. 398.

³ *Houston, etc. R. R. v. Oram* (1907) 47 Tex. Civ. App. 526, 107 S. W. 74.

⁴ *Rand v. Farquhar* (1917) 226 Mass. 91, 115 N. E. 286.

⁵ *Chesapeake, etc. Ry. v. Stock & Sons* (1905) 104 Va. 97, 51 S. E. 161.

⁶ *Keen's Exec. v. Monroe* (1881) 75 Va. 424, 428; *B. & O. Ry. v. Polly, Woods & Co.* (Va. 1858) 14 Gratt. 447; *Peshine v. Shepperson* (Va. 1867) 17 Gratt. 472.

⁷ *Chesapeake, etc. Ry. v. Stock*, *supra*, footnote 5.

⁸ It is not attempted in this note to cover the question of the duty of the trial court to instruct the jury in criminal cases. In many jurisdictions a different rule is applied in criminal cases, and a stricter duty is imposed upon the trial judge to charge the jury, even in the absence of request, on the ground that criminal justice can be better administered under such a rule. See 2 Thompson, *op. cit.* §§ 2339, 2340.

⁹ *Morgan v. Mulhall* (1908) 214 Mo. 451, 114 S. W. 4; *Miller v. Shumway* (1904) 135 Mich. 654, 98 N. W. 385; *Columbus Ry. v. Ritter* (1902) 67 Ohio St. 53, 65 N. E. 613; *Friend v. Jetter* (1897) 19 Misc. 101, 43 N. Y. Supp. 287; *Texas & Pacific Ry. v. Volk* (1894) 151 U. S. 73, 14 Sup. Ct. 239; see *Rosenkovitz v. United, etc. Co.* (1908) 108 Md. 306, 316, 70 Atl. 108; 2 Thompson, *op. cit.* § 2341.

¹⁰ *Dice v. Johnson* (1919) 187 Iowa 1134, 175 N. W. 38; *Wilson v. Commercial etc. Co.* (1902) 15 S. Dak. 322, 89 N. W. 649; *Rowell v. Town of Vershire* (1890) 62 Vt. 405, 19 Atl. 990.

the court in the absence of request, and partial non-direction.¹¹ Thus, it is argued that although it would be an impractical rule to require the trial judge to instruct the jury on all the issues and all possible hypotheses arising from the evidence of each case, yet the judge should be under a duty to instruct the jury as to the general, fundamental principles of law upon which the action is based. It is argued that total non-direction should therefore be reversible error, for the reason that where no instructions at all are given to the jury, the jurors are made judges of the law applicable to the case as well as judges of the facts. If we adopt this rule distinguishing partial and total non-direction, the difficulty at once becomes evident. How much must a trial judge charge to avoid committing reversible error? Just what principles of law are so fundamental and general that it should always be the duty of the court to inform the jury of them? We are at once confronted with the practical difficulty of having to draw a line somewhere, to decide on which of the issues raised by the pleadings and the evidence the judge should be required to charge. This practical difficulty greatly impairs the value of such a distinction as a rule of practice, which above everything else should be plain, and capable of quick application.

The best rule clearly is that the judge is not required to instruct the jury on an issue unless a party request such instruction by submitting to the court specific instructions, good in law and applicable to the evidence. The trial judge considers the facts of the case as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for trial before a jury, to discover all the possible hypotheses presented by the evidence. On the other hand, counsel has a much greater opportunity and is under a duty to know the facts of his case. Similarly, the trial judge cannot be expected to know all the involved rules of law which are applicable to all the possible hypotheses presented by the facts. This is the duty of counsel. Therefore if the judge omits to charge in regard to any essential feature of the evidence, it should be the duty of counsel to call his attention to the omission by requesting appropriate supplementary instructions. If counsel fail in this duty, he has no reason for complaint. "The rule which would allow the counsel to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection with the merits."¹²

It is to be noted here, however, that although under the majority rule non-direction in the absence of request is not ground for reversal, yet on a motion for a new trial made before the trial judge, it may be the basis of his granting a new trial. Thus, where no instructions of any kind are requested and no instructions are given to the jury, and no exceptions taken, the losing party, after a verdict, may move to have the verdict set aside. If the trial judge believes that the absence of any instructions misled the jury, he may grant a new trial. If he refuses a new trial, then in those states where a statute allows an appellate court to review the rulings of the trial court on a motion to set aside the verdict, the appellate court may set aside the verdict if it believes the jury were misled by the failure to instruct.¹³

¹¹ See *York Park Bld'g Ass'n v. Barnes* (1894) 39 Neb. 834, 836, 58 N. W. 440.

¹² 2 Thompson, *op. cit.* § 2341.

¹³ *Owen v. Owen* (1867) 22 Iowa 270. This result can be reached only in those states where statutes have been passed allowing appellate review of the trial court's rulings on a motion to set aside the verdict. At common law and in the federal courts today, the trial court's rulings on such a motion are not reviewable on appeal, but are conclusive. *Terre Haute & Indiana R. R. v. Struble* (1883) 109 U. S. 381, 3 Sup. Ct. 270. And even where a statute allows appellate review, the appellate courts are very slow to give a new trial on the ground that failure to instruct misled the jury, as it is largely a matter of discretion with the trial judge, who has the best opportunity of knowing whether or not the jury

However, it is well settled, except by statute in Mississippi,¹⁴ that the trial court may of its own motion give instructions without any request if it so desires, or it may modify and reconstruct instructions requested by counsel which are defective in form or substance, even though it is not bound to do so.¹⁵ If it does so, however, the instructions given must correctly state the law, for an erroneous instruction is reversible error on exception and appeal.¹⁶

It is argued by those courts which hold in accord with the Kentucky case,¹⁷ that, even admitting non-direction is no error where no instruction is asked, yet where a request is made which, though incorrect, is yet sufficient to call the attention of the court to the issue involved, it is the duty of the court to charge thereon correctly. But the reasons given for not imposing a duty upon the court to charge without request would apply equally here. Counsel is in a better position to know the propositions of law, often involved and dealing in nice distinctions, applicable to the facts of his case. It is part of his function to inform the court as to these propositions. So if counsel does not inform the court of these propositions and ask that they be submitted to the jury, he should not afterwards be allowed to complain that they were not submitted.

Nor can it be truly said as a general proposition that, by asking an erroneous instruction on a point, counsel has informed the judge of the rule of law involved. He has merely called the attention of the court to the issue involved, but has failed to give any correct proposition of law applicable to it. The court may refuse an obviously wrong instruction and still be entirely ignorant of the correct instruction on the point. Moreover, the difficulty in determining when an erroneous request is sufficient to call the attention of the court to the correct rule of law is evident, and the border line too vague and uncertain for the rule to prove of much value as a rule of practice. It is also impossible to draw any satisfactory line of distinction, as attempted by the courts favoring the Kentucky view, between requests which are deemed to attract the court's attention sufficiently to impose upon it the duty of charging the jury on a point, and those which are insufficient to impose this duty, though they do call the attention of the court to some point in the case.

The Arkansas court has adopted the better working rule, that unless a party has requested a correct instruction on a point, there can be no reversal on the ground that the court gave no instruction on that point. The large number of reversals, ordered on this basis in Texas and Kentucky, indicates how such a rule will flood already over-crowded appellate courts with appeals, oftentimes groundless.

were misled. In such cases, the non-direction is not *per se* ground for new trial, but it may be taken into consideration as one of the factors showing whether or not the jury were misled. It seems this same result would be reached where the trial court instructs the jury as to part of the law only, but the effect of the partial instruction is such as to mislead the jury.

¹⁴The statutes in Mississippi, Miss. Code (1917) § 577, Miss. Code (1906) § 793, have been construed as laying down the rule in that state that the court cannot give instructions except on request. *Lindsey Wagon Co. v. Nix* (1915) 108 Miss. 814, 67 So. 459. Such a statute, applying alike to civil and criminal cases, seems very severe, and no other state has adopted such a rule.

¹⁵*St. Louis, etc. Ry. v. Day* (1908) 86 Ark. 104, 110 S. W. 220; *Pauckner v. Wakem* (1907) 231 Ill. 276, 83 N. E. 202; *Harrington v. Los Angeles Ry.* (1903) 140 Cal. 514, 74 Pac. 15.

¹⁶*Mitchell v. Wellborn* (1908) 149 N. C. 347, 63 S. E. 113; *South Covington, etc. Co. v. Core* (1906) 29 Ky. Law 836, 96 S. W. 562; *Kinyon v. Chicago, etc. Ry.* (1902) 118 Iowa 349, 92 N. W. 40. However, if the instruction, though erroneous, is not prejudicial to the party complaining, it is not ground for reversal. *Illinois Cent. R. R. v. Prickett* (1904) 210 Ill. 140, 71 N. E. 435. Nor can a party complain of an erroneous instruction if he himself asked for it. *Anderson v. Northern Pac. Ry.* (1906) 34 Mont. 181, 85 Pac. 884.

¹⁷See cases *supra*, footnote 2.